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# The New Minnesota Probate Code

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## THE NEW MINNESOTA PROBATE CODE

BY WILLIAM L. EAGLETON\*

FOR various reasons, the leading one being the lack of common-law background,<sup>1</sup> the probate court of every state is regulated to an unusual extent by statute. This is true as to its jurisdiction and practice, and also as to much of the substantive law it enforces. Because the problems of the court are close to the people, the statutes are subjected to continual amendment in an effort to remove unfairnesses, to make the procedure more effective or less expensive, and to adjust the substantive law to the changing social views of the community. As each amendment adds a new section or increases the length of an old one, the probate chapters grow by gradual accretion but with no very definite plan or policy. A reorganization of this mass into a well-planned probate code, as was recently done in Minnesota, is a task requiring much careful labor and probably attracting considerable attention among both the profession and the laity.

In discussing the new Minnesota Probate Code,<sup>2</sup> it is unnecessary to duplicate any part of the printed explanation of the code prepared by the drafting committee.<sup>3</sup>

While the main object of any revision such as this one is to improve the *statement* of the law, mainly by rearranging the materials into a more orderly system of sections and articles, and by

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<sup>1</sup>The ecclesiastic courts of England did not furnish a satisfactory precedent because of obvious outward characteristics, and also its "Law," both procedural and substantive, was not sufficiently well known in this country. The common law courts might loosely be said to have "administered" the real property of a deceased person, but there was no true administration. The real property descended to the heir or devisee, the heirship or will being proved in the same manner and in the same type of case as would a deed. The creditors had no claim against the real property as they have today.

<sup>2</sup>Minn. Laws 1935, ch. 72.

<sup>3</sup>Reference here and elsewhere is to the explanation submitted to the Legislature, *not* to the report submitted to the members of the Bar Association. [Ed.]

removing ambiguities in individual sections, only a general appraisal can be made of this important part of the work.

The other important task of the committee was to change the *substance* of the rules where such changes would not be too controversial. This last limitation prevented many changes in substantive law provisions, such as those dealing with the execution and revocation of wills, or the rules of descent for intestate property. Since changes in procedure are less apt to be controversial, a critical analysis of the procedural provisions would seem fairer than a similar analysis of the substantive law provisions. Important details of the practice, however, are often governed by the custom of the courts, and the efficiency of the procedural rules can be learned, and therefore fairly appraised, only by their actual use in practice. As a nonresident, I have been permitted to suggest that the scope of the practice in the probate court is such that it will be impossible to give more than a few general comments on it.

On the other hand, the revision has called attention to the substantive law provisions and has reorganized the chapters so that they can be more intelligently studied and amended. Perhaps for that reason I have been asked to comment particularly on the substantive law sections dealing with descent and related problems.

## I. THE FORMAL CHANGES

(a) *Changes in Organization of Articles and Sections.*—The importance of the reorganization of the materials governing the work of the probate courts must not be overlooked. It has the obvious effect of making the statutory materials more readily available. Actually of more value is the fact that the reorganization clarifies the function of each section. This was a necessary step preliminary both to the less controversial amendments made during the revision and to the more controversial amendments that may now be intelligently proposed.

The need of a reorganization of the statutes dealing with the probate courts was clear. No good model was available when the first probate code was adopted in 1889. Statutory changes in Minnesota, as in other states, have in most instances probably depended upon the experiences and whims of those who could and did get their views accepted by the legislature. In the typical case, a new idea was grafted on any section that seemed at all

analogous. Dissimilar problems were handled together; one problem might be covered by widely separated sections or parts of sections. It was necessary to rearrange, consolidate and divide the old sections and to eliminate the many consistent and inconsistent duplications.

In accomplishing this reorganization, the committee deserves high praise. The articles are of convenient size and group related sections together. With but few exceptions, each section has a unity of purpose that should greatly help in promoting clarity. In fact, only two objections to the organization were noted. One was quite minor.<sup>4</sup> The other, the confusion of the widow's intestate share and the absolute share which she can obtain by renouncing any benefit under her husband's will, is discussed later. These suggestions for further rearranging do not detract from the many splendid changes that were made.

(b) *Formal Amendments in the Wording of the Sections.*—Clarity is an extremely important quality in any legal document. Many lawsuits have arisen over ambiguous language in statutes. Some cases of statutory interpretation could have been avoided by good draftsmanship; some could not have been.

Lawyers often overlook the fact that two different problems arise when drawing a statute: (1) as a matter of substance, what rule should be adopted, and particularly, how definite (as opposed to flexible) should it be; and (2) as a matter of good, clear English, how should that rule be stated so that its substance is made apparent.

As illustrative of the first problem, a criminal or civil statute regulating the speed of automobiles may lay down a definite rule applicable to all situations: the speed limit may be thirty miles per hour on all highways; or the speed limit may be varied according to the locality, as fifteen miles per hour through the business section of any town or city; or, adopting a very indefinite rule, the driver may be forbidden to drive at an unreasonably high speed. The indefinite rule has the advantage of permitting the speed to be varied with the amount of traffic, the time of day, the lighting conditions, the weather, the state of the road, the effectiveness of the driver's brakes, the weight of his load, and all other factors that should reasonably be taken into consideration;

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<sup>4</sup>Minn. Laws 1935, ch. 72. Article IV, on Wills, might be improved. No reason can be seen for separating sections 35 and 38. Sections 43 and 47 will be discussed later. Sections 48, 49 and 50 seem to belong in article V.

yet it is more uncertain in application and may be more difficult to enforce. If this indefinite rule is adopted, the statute cannot be said to lack clarity or to be formally defective merely because lawyers cannot agree whether a speed of thirty miles per hour in a certain case was or was not reasonable. So also a statute adopting the second rule is not defective in form merely because litigants disagree as to whether a certain block containing both residences and stores should be called a business block or a residence block. The first problem, that of selecting from several possible rules varying in definiteness, is a problem of substance, not of clarity or form, and will be mentioned in connection with the discussion of the procedural rules.

The second problem is less controversial, but was of more concern to the committee drafting the new probate code, as a revision should clarify all ambiguous rules. Most of the sections that were split up or combined, and many of the other sections, required and received considerable rewording in order to clarify the meaning. It is unnecessary to cite examples. Many are mentioned in the explanatory report issued by the committee. Suffice it to say that the rules as they now exist are probably as clear in wording as those of any state in the Union.

## II. THE PROCEDURAL RULES

The probate code furnishes the broad outline for the plan of administering the various types of estates brought into the probate courts. The plan must provide for court machinery which is adequate to protect all interests and insure the transmitting of good titles, yet it must be free from expensive technicalities and simple enough for the non-specializing general practitioner. Then the rules which explain that plan must be carefully chosen, with due consideration given to the problem of selecting the proper degree of definiteness or flexibility for each rule.

(a) *The Plan of the Procedure.*—The plans for administering the estates seem sound. No unusually expensive procedure was noted. Several provisions were designed to reduce costs, especially in the friendly cases instituted merely to clear title. After five years, there can be simple proof of heirship without the expense of giving notice to creditors or the danger of having their claims filed.<sup>5</sup> This useless expense is also avoided in the

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<sup>5</sup>Minn. Laws 1935, ch. 72, sec. 100. See Also secs. 101 and 107.

insolvent estate, or the small estate consisting of property which will be entirely exhausted in meeting the claims for homestead and widow's award.<sup>6</sup> Claims are easily proved.<sup>7</sup> Citations will produce the assets.<sup>8</sup> This last and other money saving proceedings will aid in protecting the estate against wrongful acts of misappropriation and mismanagement.<sup>9</sup> Time limits are set to speed up the settlement of the estates.<sup>10</sup> All in all, the new code is up-to-date and ranks with the best in furnishing the simple and efficient procedure for which probate courts generally are noted.

(b) *The Codification of the Plan.*—But the best plan of procedure, if poorly codified, will not work so well as the less scientific procedure that is well known or clearly explained in the code. It is not even sufficient that each rule be free from ambiguity. First, it is necessary to make a selection of the details to be covered more or less definitely by the rules, the other details being left, without specific mention, to the uncoded common law or custom of the court developed under the broad powers inherent in the general jurisdiction given the court. Second, as the selection is made, the degree of definiteness of each rule should be carefully determined.

A statute covering the entire field of practice before the probate courts could not regulate each detail. And such minute codification would not be desirable. It is true that a detailed rule of procedure may be easy to follow if it is discovered. But it might be overlooked, and there is a tendency to penalize an error too severely (by an adverse decision as on the merits) when the procedure is codified in detail. Also there is always present the danger of making the rule broader than the cases in mind, and the rule may not work at all well in the unanticipated cases.

An illustration will be given of a detail that might well have been left uncoded. A special administrator would ordinarily be superseded by a general administrator when one is appointed; at least the court would order the special administrator to file his report and deliver all property to the general administrator. General Statutes, sec. 8785 contained a specific requirement to this

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<sup>6</sup>Minn. Laws 1935, ch. 72, sec. 125.

<sup>7</sup>Minn. Laws 1935, ch. 72, secs. 100 to 106.

<sup>8</sup>Minn. Laws 1935, ch. 72, sec. 191.

<sup>9</sup>Minn. Laws 1935, ch. 72, secs. 95, 96 and 121 in addition to 191.

<sup>10</sup>In particular, see Minn. Laws 1935, ch. 72, secs. 76, 87, 90, 100, 113, 125, 166, 169 and 172.

effect, along with other somewhat unrelated matter. The revision committee separated it from the other matter and honored it by making it a section by itself, section 77. Then apparently someone in the legislature thought of a case where it might be desirable to continue some of the powers of the special administrator, so the section, as finally adopted, contains the reservation: "unless otherwise expressly ordered by the court." That amendment may take any undesirable sting out of this section, but it is submitted that the section serves no really useful purpose.

No arbitrary rule can determine when the method of handling a detail should be crystallized by statute, and when it should not be. Usually a revision is guided very much by the existing provisions. These in turn may have been determined by accident. There is much lack of uniformity among the states. In this revision, probably no careful study was made of the statutes of other states to see what additional details such states apparently found to be desirable subjects for codification. That is just as well; there is less danger in omission than in the definite provision that usually covers many situations when only a few of them have been considered in framing the rule. Perhaps it would have been better to have made a study with the opposite object: namely, of determining which details had been successfully omitted by other states, to be left to common-law principles, or covered by broader provisions granting much discretion to the court.

Inseparable from that first problem of selecting the details to be codified is the second problem of determining the degree of definiteness with which each rule should be stated. Again the answer will vary with the situation, with reasonable differences of opinion. Absolute definiteness is seldom attainable, but some types of rules are usually very definite, such as time limitations and provisions for notice by publication. So also, a definite minimum number of witnesses must attest and subscribe the will, and the court will not be given any discretion to determine which of the near relatives of the intestate are entitled to share in the estate, or which of the creditors should have priority in the payment of debts. On the other hand, the court may have considerable discretion in setting the amount of a bond to be filed, or in determining whether or not to approve a sale, and the court may remove a representative on such indefinite grounds as being "unsuitable, incompetent, or incapable of discharging his trust."

Often the problem of selecting the most desirable rule is a difficult one, especially when several different degrees of definiteness are suggested. Epithets are often used, but they do not really solve this problem. "Flexible" is merely a friendly synonym for "indefinite" and even "vague," and the "definite" rule can be called "inflexible" or "technical" or "dogmatic." The more definite rule is easier to apply and subjects the court to fewer charges of favoritism, but it is apt to be harsh when applied to some of the less typical cases. If the definite rule is one of common law, an exception can easily be developed to cover the unanticipated case. However, this is not so often possible when the rule is prescribed by statute. The statute itself may limit the rule by exceptions, but often the need for the exception is overlooked. There is less risk if an indefinite rule is used.

The new probate code shows the results of care taken to limit each rather definite rule to the situation in which it reaches a fair result, or to temper such a rule by a provision giving the court discretion to waive the requirements of the rule. Such limitations and provisions indicate care in drafting and are generally quite laudable. In a few of the sections, however, the code adopts or retains such a discretionary provision in situations where discretion is seldom found. Thus, claims against the estate of a deceased person must be filed within four months after the order is filed; yet the time may be extended, but not beyond a year, in a particular case "for cause shown and upon notice to the representative."<sup>11</sup> While the normal period is quite short, such discretion in the court to waive a statute of nonclaim or a statute of limitations is certainly unusual.<sup>12</sup> The code grants a similar

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<sup>11</sup>Minn. Laws 1935, ch. 72, sec. 101. A similar provision with a different time limitation was found in Mason's 1927 Minn. Stat., sec. 8811.

<sup>12</sup>Sometimes a late creditor is given relief against uninventoried assets which he may discover. Exceptions to the running of the statute of limitations are often made in favor of an infant or person under disability, or in cases of fraudulent concealment. Also, of course, the doctrine of laches in equity is applied with considerable discretion on the part of the court. But these hardly furnish a precedent for this provision.

If the theory was to have an absolute limit of one year, with some provision that would cause most claims to be filed within four months, some equally effective substitute for the threat of disallowance might be devised that would not have the undesirable feature of discretion, with possible charges of favoritism. Thus, the filing fee might be increased for late claims; it might vary with the amount of the claim and/or the lateness in filing, as a fee of one per cent. of the claim for each month or part of a month in excess of the four months. Of course, section 101 would have to be re-examined to make sure it would protect the contingent claim which becomes absolute after the four months.



discretion to the court to waive the requirement that the spouse must file his (or her) renunciation of the will and election to take the statutory share within six months;<sup>13</sup> there may be more need for the discretion in this case.<sup>14</sup> However, there seems to be less justification for the discretion provision in another section: in case an apportionment of legacies is necessary to raise a share for an after-born child or an omitted child, a "different apportionment" may be adopted "in the discretion of the court" in order to carry out "the obvious intention of the testator."<sup>15</sup> Perhaps this merely means that the court is to use common sense and consider all the surrounding circumstances in determining the "obvious intention of the testator," but that idea could be expressed by a more happy provision than the one leaving it to "the discretion of the court."

In another but quite dissimilar section, the code may be too definite. In the repealing section, the previous statute is unqualifiedly repealed, without a saving clause continuing criminal liability for acts committed prior to the effective date of the new code and criminal under both the repealed and the new code. Though perhaps not actually needed in this statute,<sup>16</sup> such a saving clause might well have been added as a measure of precaution.

The admission must be made that it is somewhat unfair to pick out these particular sections for criticism. Many of them are controversial, and if errors exist, all of them are minor ones. The sections dealing with procedure appear to be carefully drafted and prescribe with sufficient clarity, yet also with sufficient flexibility, the well-conceived plans for administering the estates brought before the probate courts. While actual practice is the

<sup>13</sup>Minn. Laws 1935, ch. 72, sec. 47 provides: "For good cause shown, the court may permit an election within such further time as the court may determine."

<sup>14</sup>The widow may reasonably wish to wait until all claims have been filed, or even certain litigation has been settled, so as to know just how much she would get under each plan before making her choice. This will not delay a settlement of the estate, as the litigation will prevent such a settlement. Compare: *Eagleton, The Dower Rights Act*, secs. 5 and 6, (1935) 20 Iowa L. Rev. 261.

<sup>15</sup>Sec. 43. The second sentence provides: "But if the obvious intention of the testator in relation to some specific devise, bequest, or other provision of the will would thereby be defeated, then such specific devise, bequest, or provision may be exempted from such apportionment, and a different apportionment adopted in the discretion of the court." This provision is not new to this revision. See: *Mason's 1927 Minn. Stat.*, sec. 8746.

<sup>16</sup>There are few criminal provisions, and most of those are for failure to act, and the failure to act after the new code became effective would be an offense. Also see *G. S. 10930*.

sure test, it is believed that the bar of Minnesota will have a minimum of trouble with the procedural sections of the new code.

### III. SUBSTANTIVE LAW PROVISIONS

The new code is a revision of the previous statutes. Quite properly, controversial amendments to the substantive law provisions were studiously omitted. A combination of several small minority groups, each opposing a different amendment, might together have constituted a sufficient majority to defeat the revision. The amendments to the substantive law, however, should now be considered. The following comments were solicited as suggestions for such amendments, and are not at all proper as criticisms of the work of the Revision Committee.

(a) *The Confusion of Descent and Dower Rights.*—In the great majority of our states, four provisions are made for the widow, and these four interests or rights which she has in her deceased husband's estate are entirely distinct and should not be confused. First, she is entitled to her "widow's award," an allowance which takes precedence over the claims of general creditors and which is for the purpose of maintaining the family during the course of the administration of the husband's estate. Second, various types of homestead rights are provided for her. Third, if her husband died intestate, she is entitled to take, by descent, a share in the estate remaining after the payment of debts. Fourth, she has some absolute right in the estate which cannot be defeated by her husband's will and sometimes not by her husband's creditors.

The common-law antecedent of the fourth right was dower, and the modern form is often called the widow's dower rights. While dower protected the widow from her husband's debts and grants as well as from his devises, the main characteristic retained by the statutory substitutes for dower has been the protection from his devises; she is entitled to renounce the will and take her absolute share. It applies, then, to testate estates, while descent applies to intestate estates. The two are apt to be confused, and a conscious effort should be made to keep them separated; at least they should appear in separate sections in the code.

The new code makes many improvements in the organization of the descent article, the principal one being the amalgamation of the real property and the personal property sections. But it

retains the faulty plan of including the provision for the widow's statutory dower rights in the same section<sup>17</sup> with the descent rules. The same provision defining the share to be taken on renunciation likewise defines the intestate share, supplemented by a later subdivision increasing the intestate share in the absence of issue.

This arrangement tends to confuse the two distinct interests. Of greater harm, the arrangement is fundamentally so complicated and rigid that it actually controls the substance of some of the rules of descent by making it impracticable to amend the section so as to include more factors in determining the widow's intestate or her absolute share.

A problem arising during the present revision furnishes an excellent example. The old statute gave the widow the right to renounce the will and take as her *absolute* share one-third of the estate in all cases regardless of the existence of children, or of their number. The same rule governed the widow's *intestate* share, supplemented by the later subdivision giving her the entire estate in the absence of issue. While in apparently only one state<sup>18</sup> does the widow's *absolute* share vary with the number of children, and in only a few states<sup>19</sup> does this *absolute* share increase when there is no issue, in many states<sup>20</sup> the widow's *intestate* share is larger when only one child survives, and in practically all states this *intestate* share is larger when there is no surviving issue.<sup>21</sup> Some states provide for additional variations in this *intestate* share, depending upon the degree of relationship of the nearest collateral relatives. Some of these variations may not be desirable, but some of them certainly are. Yet it would be difficult because of its form to amend the Minnesota section in order to adopt any of these variations. However, the State Bar Association passed a resolution requesting that the widow's share should be increased from one-third to one-half in case only one child (or its issue) survives.<sup>22</sup> To increase the widow's *intestate* share with-

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<sup>17</sup>Minn. Laws 1935, ch. 72, sec. 29.

<sup>18</sup>This Ohio provision may be retained, though the whole plan for an absolute share as adopted in 1932 is so faulty that it probably will not long survive in its present form. Ohio Code (Throckmorton 1934) secs. 10502-1 and 10503-4.

<sup>19</sup>Including: Florida, Illinois, Maine, Maryland, New Hampshire, New York and Wisconsin.

<sup>20</sup>Twenty-three states are listed in: Eagleton, The Intestacy Act, (1935) 20 Iowa L. Rev. 244, 250.

<sup>21</sup>Eagleton, The Intestacy Act, (1935) 20 Iowa L. Rev. 244, 250.

<sup>22</sup>This resolution is mentioned in the committee's explanation of section 29. In descent, there may be a policy favoring equality for the widow

out increasing her *absolute* share would be difficult in view of the duplicitous and rigid nature of the section. The arrangement that was adopted added subsection 3 making the increase (to one-half) apply to the one-third share previously defined. Because that one-third share applied both to the widow's intestate share and to her absolute share, *both* seemed to be increased by this amendment. This is unfortunate, and probably was not intended by the resolution of the State Bar Association, as indicated by two items: (1) apparently all the states,<sup>23</sup> some twenty-three in number, that have such a variation, apply it *only* to the *intestate* share and *not* to the *absolute* share; and (2) the result is ridiculous in that the widow's absolute share is made greater when a child survives than when the nearest relative is a collateral (and more remote) one. This latter is a reversal of the plan, found in all other statutes and in all other places in this statute, of increasing the widow's share when the nearest blood relatives are more remote. It is submitted that this unfortunate error would not have been made if this section had not confused the two concepts of the intestate share and the absolute share of the surviving spouse.

Before any real improvement can be expected in the descent and the dower rights provisions, these two fundamentally different problems must be separated, certainly into different sections and preferably into different articles.

(b) *Descent.*<sup>24</sup>—The organization of the descent article was greatly improved in the revision. There still remains the need of removing the dower rights provisions, discussed above. A slight additional gain in simplicity and flexibility could be achieved by combining all the provisions for the intestate share of the spouse in a separate section or subsection.

The code, following the previous statute, properly makes identical provisions for the surviving husband and the widow (throughout this comment, the widow alone is mentioned in order

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and the child. This policy does not apply to the dower rights, as the child may be entirely disinherited.

<sup>23</sup>In Ohio the absolute share is apparently made the same as the intestate share, but that provision is too absurd to be considered permanent, as in many cases the absolute share would include the entire estate. Ohio Code (Throckmorton 1934) secs. 10502-1 and 10503-4.

<sup>24</sup>Most of the suggestions made herein are to be found in my proposed statute, cited *supra* note 20. That statute is there annotated with comments that indicate in general the present statute law of the various states on many of the controversial provisions.

to simplify many of the sentences). The increase of the widow's share from one-third when children (or their issue) survive to one-half when only one child (or its issue) survives is in keeping with the modern tendency. The giving of the entire estate to the widow in the absence of issue seems overly liberal. At common law her share in realty was limited to her dower estate. The modern tendency, based on present social trends, is to give her a more substantial share in both the real and the personal estate, but only seven other states are as liberal toward the widow as Minnesota. It is true that in some cases the husband would be very unfair if he did not leave everything to his wife. That is particularly true where the estate is only large enough to supply her with a fair living. But where the estate is larger, her collateral relatives have no stronger claim to the surplus than do his. Suppose both husband and wife inherit separate estates. Under this provision the property of both would ultimately go to the relatives of the survivor. The conflict between the claim of the widow to support (plus her half of the joint savings held in the husband's name) and the claim of the blood relatives to preference in the excess can be equitably settled by giving the widow (in addition to her widow's award, homestead, and probably insurance) all of the first \$10,000.00 (or some similar sum) and one-half of the residue.

A similar conflict exists when the intestate is survived by one or more parents and by brothers or sisters (or their descendants). The parent is more apt to need support. The brother is more apt to be capable of handling the excess estate, as the parents are probably old if the child lived long enough to accumulate an estate. Again this conflict can be resolved by giving all, up to a certain sum, to the parents, and dividing the excess equally among the parents, brothers and sisters. The prevalence of life insurance adds an argument against the provision in the code giving all to the parents: the parent dependent on a prosperous unmarried son for support is apt to be the beneficiary of insurance carried by that son.

The expression "by right of representation" is ambiguous. I have suggested the use of the terms "per stirpes" and "per capita with representation" for the two distinct concepts.<sup>25</sup> The history of the use of the ambiguous word "representation" in the Min-

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<sup>25</sup>Supra, note 20, at pp. 244, 246-249, and 252.

nesota statutes, including the present revision, further justifies my condemnation of that use. The problem of interpretation arises under subsection 4 (1) as to grandchildren and subsections 4 (4) and 4 (5) and subsection 5 as to nephews. If the intestate's two children predeceased him, one leaving two sons and the other one daughter, will each be entitled to one-third, or should the two grandsons each receive one-fourth and the one granddaughter receive the remaining one-half? Similarly, should the three nephews, descendants of two deceased brothers, share equally, or should the estate be divided into halves, with the share of one deceased brother being divided among his two sons?

The first Minnesota case, *Staubitz v. Lambert*,<sup>26</sup> held that the nephews and nieces should share per capita. Two lines of argument were used: (1) Kent, and some supporting cases, applicable to subsections 4 (4) and (5) of the new code, were quoted for that interpretation (contra cases being ignored); and (2) the subsection similar to subsection 4 (5) provided for an equal distribution among the next of kin in equal degree "if the intestate leaves no issue and no husband or wife, and no father, mother, brother or sister," and this section applies. That left the distribution among grandchildren in doubt. Argument (1) would apply there also, but (2) would not.

Next, the revision of 1905 made several changes in the wording of several parts of the statute. The predecessor of subsection 4 (5), quoted above, was amended to apply if there were no "issue, spouse, father, mother, brother nor sister, *nor living issue of any deceased brother or sister.*" This eliminated, perhaps unintentionally, the second argument of *Staubitz v. Lambert*. Following this revision, the case of *Swenson v. Lewison*<sup>27</sup> raised the same issue regarding the distribution among nephews and nieces. This case ignored the first argument of *Staubitz v. Lambert* (which, it must be admitted, had not been strongly stated), and held that the amendment makes the predecessor of subsection 4 (5) inapplicable; the subsection corresponding to 4 (4) of the present code applies; it and (by way of dictum) subsection 4 (1) provided for a per stirpes distribution among nephews and among grandchildren.

The next session of the legislature removed the italicized

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<sup>26</sup>(1897) 71 Minn. 11, 73 N. W. 511.

<sup>27</sup>(1916) 135 Minn. 145, 160 N. W. 253.

words of the subsection corresponding to 4 (5), apparently with the object of returning to a per capita distribution among nephews and nieces.<sup>28</sup> The new code likewise omits the italicized words.

In a later case, the dictum and reasoning of *Swenson v. Lewison* are followed.<sup>29</sup> Nephews and nieces now, therefore, share per capita without representation (i.e., children of deceased nephews are excluded) under subsection 4 (5). On the other hand, grandchildren and great grandchildren take per stirpes under subsection 4 (1).

This leaves subsection 5 for interpretation.

"If a minor dies leaving no spouse nor issue surviving, all of his estate that came to him by inheritance or will from his parent shall descend in equal shares to the other children of the same parent and to the issue of any deceased child of such parent by right of representation; failing all such it shall descend by intestate succession as in other cases."

It will be noted that the last part of this sentence does not apply when nephews survive. The first part of the sentence applies, and under *Swenson v. Lewison* the distribution would be per stirpes, though any other estate he might have (as his savings from the income, or properly inherited from collaterals) would be distributed among his nephews and nieces per capita. That inconsistency is undesirable, and was certainly not intended, as the report of the drafting committee states<sup>30</sup> that a change was made in subsection 5 "making the rule as to representation the same as in subparagraph 4 (4)."

It is submitted that the ambiguous expression "by right of representation," now used three times in the code, should be entirely eliminated, and two new expressions should be defined and used.

There are two other questionable features of the descent article that need only a slight mention because the sections involved are seldom used. The provision for the kindred of the half blood contains a remnant of the now disfavored and discarded ancestral estates doctrine; this provision is found in several other states, but it has no valid place in our law today. The provision for the illegitimate child is not in keeping with our present social policy of treating him as a legitimate child of the mother as far as pos-

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<sup>28</sup>Minn. Laws 1917, ch. 272, sec. 1.

<sup>29</sup>In re Estate of Fretheim, (1923) 156 Minn. 366, 194 N. W. 766.

<sup>30</sup>Page 4.

sible. Relatives of the mother, or rather, "her heirs,"<sup>31</sup> may inherit from the illegitimate, but the illegitimate cannot inherit from those relatives.

By way of summary it should be said that the descent provisions of the probate code are at least as good as the average descent statute found in this country.

(c) *Dower Rights*.—Mention has been made of the need of a separate article covering the right of the disappointed spouse to renounce the provision of the will and take a statutory share. In this article should appear the appropriate parts of section 29 and all of section 47. Section 43 covers the problem of abating legacies to raise the share for the after-born child and the omitted child; the same procedure should be provided for raising the widow's share upon renunciation, with perhaps a further provision regarding the use to be made of the legacy renounced. Other sections found in typical dower rights acts might also be included.

As previously indicated, the dower rights in case no child survives should be at least as great as when one child survives.

The provision protecting the wife's absolute share in the real property from a voluntary transfer by the husband might well be eliminated, as it can hardly be very effective in protecting her so long as the share is not protected from his creditors. At least, the protection is not commensurate with the cost; the alienation of land is somewhat impeded, and difficulties of title are apt to arise. In addition, this complication raises several problems of interpretation. For instance, what is the effect of eliminating the sentence: "But the land so inherited shall be subject in their just proportion to such debts of the decedent as are not paid out of his personal estate."<sup>32</sup>

A few other questions might be asked regarding problems connected with a renunciation by the surviving spouse,<sup>33</sup> but these

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<sup>31</sup>That part of section 33 provides: "his estate shall descend to his mother, or in case of her prior decease to *her heirs* other than such child." Perhaps *her heirs* were selected in order to include another illegitimate child of the mother. But this expression raises at least two interesting questions: (1) Are her heirs determined at *her* death, so as to include one of her heirs who died after the mother but prior to the death of the intestate? An affirmative answer is indicated by the exception of the child himself. (2) would a surviving husband of the mother inherit as "her heir," even though he is not a relative of the illegitimate?

<sup>32</sup>This sentence was in Mason's 1927 Minn. Stat. sec. 8720. The sentence was eliminated from section 29, subdivision 2, of the probate code.

<sup>33</sup>For instance, what effect does the last sentence of section 47 have in case of *partial* intestacy?



dower rights sections so obviously require a complete revision that ; in their present form, they need not be given further attention. This criticism should be carefully limited to the dower rights provisions, as they constitute the only really defective part of the whole probate code.

(d) *Wills*.—The provisions governing the execution of wills follow rather closely those found in the English Statute of Frauds. A discussion of such provisions seems unnecessary. While improvement in them is not impossible, the changes made by the English Wills Act and other more recent statutes have, in the main, consisted of additional technicalities to hinder the honest but unskilled or poorly advised testator. Too many of these technicalities require parol evidence for proof of compliance, and this produces the opposite effect to that intended, in that fraudulent parol evidence may defeat the honest and properly executed will. It is a pleasure, in examining the probate code, to note the absence of these innocent-looking but dangerous modern frills.

A few of the sections on revocation of wills deserve specific notice.

In the section prescribing the exclusive methods of intentional revocation, the English Statute of Frauds provided that no devise in writing of lands, "*nor any clause thereof*," should be revocable otherwise than by the methods enumerated. Section 39 of the Minnesota Probate Code commences: "No will in writing shall be revoked," omitting the specific authorization of the partial revocation. This presents an unnecessary ambiguity that has caused considerable trouble in many other states, with irreconcilable disagreements as to the validity of a partial revocation by physical act.<sup>34</sup>

Section 40 provides: "If after making a will the testator marries, the will is thereby revoked." Does that apply to the will made in contemplation of that particular marriage? It apparently does,<sup>35</sup> but it should not. Shortly before the wedding, the bridegroom might execute a will providing for his prospective wife; there is more time for this before the wedding than shortly there-

<sup>34</sup>The law is still unsettled in Illinois. See: (1932) 27 Ill. L. Rev. 327.

<sup>35</sup>In the case of *In re Estate of Kelley*, (1934) 191 Minn. 280, 254 N. W. 437, the court assumed that the proponents had proved that the purported will was executed by a woman in accordance with an antenuptial contract which gave her the power to dispose of her property by will. Seven days later she married the man with whom she had this contract. At her death, held: the will was revoked by the marriage, in accordance with this provision of the statute.

after, and a will may be immediately desirable if they are to start at once on an extended trip. An absolute revocation, against the clearly expressed intent of the testator to the contrary, seems indefensible. According to the same section, a divorce revokes all provisions in the will in favor of the divorced spouse. Yet the will might have been executed as part of the property settlement agreement. In this case, the rule is tempered by the fact that there would appear to be a contract to devise which would give a remedy to the disappointed divorcee.

Section 41 provides an intestate share for the after-born child omitted from the will, "unless it appears" that such omission was intentional and not occasioned by accident or mistake. That raises the question as to what evidence is admissible to make that intention "appear." Several different rules are possible; inability to agree on any one does not justify an ambiguous provision such as this one. A similar provision is found in section 42 favoring the omitted child.

Sometimes a testator retains a will unrevoked long after circumstances have occurred making the provision inequitable. At common law, the will of a woman might be revoked by her marriage, and the will of a man might be revoked by his marriage followed by the birth of an heir. Only these two types of changes might produce a "revocation by change in circumstances." Section 40 of the code provides for marriage and, in addition, divorce. The dower rights sections also protect the widow. Section 41 gives an intestate share to any after-born child. These provisions greatly extend the common law protection against a "change in circumstances." Yet section 39 ends with the sentence: "Nothing in this section shall prevent the revocation implied in law from subsequent change in the condition or circumstances of the testator." It is doubtful if this well-meaning but indefinite provision furnishes protection that is worth the expense of the litigation necessary to discover how far the Minnesota courts are willing to go in prescribing a revocation when there has been a change in circumstances following the execution of the will.

Section 39 permits a revocation by burning, tearing, cancelling, obliterating or destroying, only if done "with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence by his direction and consent." A will is not revoked by accidental destruction. Yet section 62 provides that a lost or destroyed will shall not be probated: "unless the

same is proved to have been in existence at the time of the testator's death or to have been fraudulently destroyed in his lifetime, nor unless its provisions are clearly and distinctly proved." If literally construed, this second section would be inconsistent, in effect, with the first section and would sometimes reach a harsh result in defeating an accidentally destroyed will. While much of the harshness and inconsistency have been removed from this section by the interpretation given it in Minnesota, this REVIEW has already called attention to the need of a careful reconsideration of both its policy and its wording.<sup>36</sup> It is submitted that the last clause in this section, requiring clear and distinct proof, is a sufficient protection against fraud. An absolute bar to the probate of a will accidentally lost or destroyed during the lifetime of the testator would be unnecessarily arbitrary and entirely out of harmony with this code which so often contains provisos granting discretion to the court to temper the severity of its indefinite rules.

#### IV. IN CONCLUSION

Attention must again be called to the fact that this comment was prepared in answer to a request for a critical analysis of certain parts of the new Minnesota Probate Code. A laudatory, book-reviewish comment would furnish little aid to a committee that is not satisfied with the successful completion of the first step of revision but is now looking forward to the possibility of making further improvements in the probate law.

The many minor suggestions are justified only by the belief that an improvement will not be rejected merely because it is minor. Even the few major objections raised in this comment were generally directed at matters not properly within the scope of the work of the committee in its revision.

If an appraisal of the probate code and the work of the revision committee is desired, I take pleasure in again stating, as deserved praise and not as a laudatory palliative, that the present Probate Code of Minnesota is perhaps the best probate code to be found in this country today, that its organization is so clear that improving amendments can safely be inserted in their proper places, and that this is all the result of the extremely careful and intelligent work of the revision committee and those who aided in their work.

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<sup>36</sup>See (1923) 8 MINNESOTA LAW REVIEW 51, 56, commenting on *In re Estate of Havel*, (1923) 156 Minn. 253, 194 N. W. 633.